



University of Baltimore Law
ScholarWorks@University of Baltimore School of Law

All Faculty Scholarship

Faculty Scholarship

10-2001

Business Lawyer, Woman Warrior: An Allegory of Feminine and Masculine Theories

Barbara Ann White

University of Baltimore School of Law, bwhite@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac

 Part of the [Law and Gender Commons](#), [Legal Education Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Business Lawyer, Woman Warrior: An Allegory of Feminine and Masculine Theories, in *Liber Amicorum*, Yvette Merchiers (Universiteit Gent/La Chatre, October 2001)

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

Business Lawyer, Woman Warrior: An Allegory of Feminine and Masculine Theories

"Why can't a woman be more like a man!"

Henry Higgins — lead character in *My Fair Lady* (one of the most popular United States musical plays of the 20th century), written by Alan Jay Lerner and Frederick Loewe (1957).

Barbara Ann White (*),
Associate Professor of Law
University of Baltimore School of Law

Chapter 1. An Allegory of Feminine and Masculine Theories

It is a curious thing when one examines the facets of the women who were among the "first" of their gender to break through to occupations of power formerly open to men alone. Women "firsts," a phenomenon that became widespread during the last half of the 20th century, continues today. Most notable, however, are the early women "first" who often had characteristics that were at the time considered a variance with the image of what a woman was and how she would (or should) be.

Yvette Merchiers was no exception to this.

Now that we are in the new millennium, women breaking new ground to assume high level professional roles have become rather commonplace. Though such events are still deemed noteworthy, they are not accompanied with the level of fanfare or askant opinion that typically occurred in the early days of the latter half of this past century when certain women dared to approach the finish line of professional accomplishment and acknowledgment (1). Compare attention given

(*) I am honored to have been invited to write this essay in tribute of Professor Yvette Merchiers. Many people have been extremely helpful in the process and to them I convey my appreciation. Though my interviews with individuals were under conditions of anonymity, I wish to express thanks here to Dr. Eric Schoentjes, Professor Merchiers' younger son, for his gracious assistance in helping me translate some of Professor Merchiers' work and for his patience in explaining to me aspects of Belgian society that my foreign eyes would not have readily grasped.

(1) Consider well-known television journalist Barbara Walters' notoriety in 1976 for signing with ABC to be the first woman to co-anchor a major U.S. network's Evening News and for earning a then record-breaking \$1,000,000. Her 15 years success on the highly regarded "Today" show notwithstanding, disparaging critical and public reaction to her new "male bastion" position and salary insinuated a degradation of the evening news to
.../...

25 years later to Shirley Tilghman's appointment in 2001 as the first woman president of Princeton University and thus the first woman president of any of the very elite universities in the U.S. This ground-breaking event, though noted in newspapers, did not warrant front page treatment by either the New York Times or the Washington Post and received no mention in either Time or Newsweek Magazine, the leading weekly news magazines whose covers blazoned the Walter's ABC hire 25 years earlier.

It behooves us to look at these first women "firsts," to note their exceptional qualities, and to understand in a broader perspective what their accomplishments have been and the impediments they had to overcome. Only through such an examination are we able to begin to appreciate the full measure of enriching change in our society that has been wrought by the extension of the compass of achievement to the "other" sex.

The question is how should we go about looking at the impact of such women. Should we list their accomplishments, note their noteworthy contributions, mark the milestones of their career? Certainly in the case of Yvette Merchiers, her career is stellar, yielding a résumé impressive in its range and its influence. The diversity of her career in practice, in the university, as a scholar and in her influence on the evolution of Belgium law is remarkable, reflecting a suppleness of mind that is capable of grappling with all that intrigues and motivates it.

Certainly to comment on her accomplishments in themselves would not be an uncommon approach to assess such a remarkable career. But a mere listing of her accomplishments would fail to reveal if any of Professor Merchiers' characteristics that influenced her choices were also characteristics that impelled her to have the courage to be one of the first of the women "firsts."

If we miss a deeper analysis, we may miss taking full measure of Professor Merchiers' impact on her environs. Typically an appreciation of the emergence of women in the workplace world is focused on the benefits that the woman derives from such liberation, the access to equal opportunity for income and prestige that were formerly denied her. Only in the last several years has awareness arisen that the benefits also flow the other way. In other words, society gains as well from including people formerly excluded from the mainstream of social functioning. Though attention is growing as to how "diversity" (the inclusion of

.../...

"infotainment." Overwhelming deprecations compelled ABC to relieve Ms. Walters of her duties as co-anchor in less than three years, despite her stellar performance which included, among other history-making interviews, being the first newsperson ever to arrange a joint television interview with Egypt's President Sadat and Israel's Prime Minister Begin at the height of Mideast tensions. Ms. Walters' courage and persistence, however, have since transformed attitudes towards her talent, and her accomplishments have been acknowledged with innumerable awards and honors throughout her career. See generally, Cover Story, New York Magazine, April 6, 1998; MILLER, Mark Crispin. "Barbara Walters's Theater of Revenge", *Harper's Magazine* (New York), November 1989; SANDERS, Marlene, *Waiting for Prime Time: The Women of Television News*, University of Illinois Press, 1988.

the formerly excluded) enhances social welfare, these efforts are just beginning (2). Certainly examining the careers of the first women "firsts" in the context in which they emerged contributes to that effort. Understanding the social barriers they helped demolish and the perspectives they brought to their professions would be invaluable to understanding prejudices still at the core of the social norm. Professor Merchiers is certainly a good candidate for that endeavor.

Accordingly, if one wants to take a different approach to examine Professor Merchiers' career, what philosophical framework might one choose to conduct such an examination? Since Professor Merchiers was indeed one of the first woman "firsts," it would seem natural to consider such an inquiry in the context of feminist theory. Certainly feminist theory arose to address the concerns of women in general. In the United States feminist theory is considered to be one of the most significant analytic contributions to social philosophy in the last half of the 20th Century (3). Feminist analysis has certainly transformed numerous areas of a variety of disciplines in the United States permanently (4).

The concerns of women, however, was never a professional topic of pursuit for Professor Merchiers. Indeed one characteristic that stands out about her career is that, atypically, the profession (law) and the areas within the profession (business law) that Professor Merchiers pursued were not fields customarily associated with those women who indeed chose to blaze new trails in her time. In fact the fields she chose were those most strongly identified as "male" and with the masculine ego and intellect. At the time of Professor Merchiers' professional rise and the years following, even as women began to enter the legal profession in numbers greater than the haphazard occasional one, the fields those women typically chose (at least in the United States) very much involved women's issues: divorce and family law, areas of gender discrimination such as employment law and health law, and subjects often considered the natural province of women as, for example,

-
- (2) See, e.g., Anthony T. KRONMAN, «*Is Diversity a Value in American Higher Education?*» 52 Fla. L. Rev. 861 (2000); Steven A. RAMIREZ *Diversity And The Boardroom* 6 Stan. J.L. Bus. & Fin. 85 (2000); Robert PERLOFF and Fred B. BRYANT, *Identifying And Measuring Diversity's Payoffs: Light at the End of the Affirmative Action Tunnel*, Assessing the Value of Affirmative Action, 6 Psychol. Pub. Pol'y & L. 101 (2000).
- (3) "By 1996, every leading [United States] law school lacking an established feminist legal theorist was clamoring for one. Articles continue to be published in leading law reviews and there are several new feminist jurisprudence casebooks", Patricia A. CAIN, *The Future of Feminist Legal Theory*, 11 Wis. Women's L.J. 367, 370; "[F]eminism...did not exist as an organized academic field thirty years ago, but...today flourishes...under the banner of feminist jurisprudence...where it has influenced academic legal thinking not only about women's legal rights but also about the nature of legal reasoning....", Richard A. POSNER, *Legal Scholarship Today*, 45 Stan. L. Rev. 1647, 1651
- (4) "[F]eminist jurisprudence has had an impact on the world outside the university as well as within it-[it] has for example succeeded in persuading judges to recognize sexual harassment as a legal wrong (a form of sex discrimination) and in persuading legislatures to recognize marital rape as a crime and to make rape easier to prove", Richard A. POSNER, *Legal Scholarship Today*, 45 Stan. L. Rev. 1647, 1651

juvenile law, judicial treatments of rape and sexual harassment (5). Certainly feminists and feminist theory offered considerable contributions to those fields, often radically changing their orientation. And one might conclude therefore that a feminist analysis of these women's work would prove fruitful and enlightening indeed.

However, Professor Merchiers was not only anomalous for her time because she was one of the very few women to pursue a "masculine" course of life — a high-powered professional career — but she was again anomalous because she chose a course that was dramatically different from those of the few other women who also dared to pursue a high-powered career. Thus she not only chose differently from most women of her time but within the small group of women who did pursue a course similar to hers, she chose differently from them as well. Is it possible then for a feminist analysis to offer much insight about a woman and her work who has taken a decidedly different course of endeavor than other women professionals, particularly when her field — business law — does not entail any of the issues that feminist theory was designed to address?

Interestingly, feminist theory, though spawned by the motive to address women's concerns, has in recent years demonstrated itself to be a rigorous analytical tool and philosophical framework that stands on its own, apart from whether it advocates the rights of gender or any other discriminated group. Though feminist legal theory has played a prominent and scholarly role for over a quarter of a century in the development of legal thought in many areas containing women's issues, only lately has it come to mind that feminist theory could inform interesting questions about concerns that have nothing to do with women's issues. Coincidentally, over the last decade there has been a surge of interest in what feminist theory has to offer business law in particular, a decidedly non-"woman's issue" subject matter. A number of scholars, both feminist theorists and business law scholars have demonstrated that feminist analysis can be enlightening about a number of business law conundrums, offering new perspectives on possible solutions (6).

On the other hand, most recently in the context of business law analysis, it has been suggested that some applications of feminist analysis to business law have engaged in a kind of exclusion to which modern feminist theory since its origins has objected. (One of the principles of feminist theory is the inclusion of the excluded "voice" in policy analysis, though their focus has been on the "excluded

(5) Ironically today, it is men who seek the legal protection afforded by women's groups decades' long efforts to acknowledge and define sexual harassment, though it is still against men (both hetero- and homosexual) that the charges are pressed. Reed Abelson, «Men, Increasingly, Are the Ones Claiming Sex Harassment by Men», *NY Times A1* (June 10, 2001).

(6) Kellye Y. TESTY *Adding Value(s) To Corporate Law: an Agenda For Reform*, 34 Ga. L. Rev. 1025 (2000); Barbara Ann WHITE, *Feminist Foundations For The Law of Business: One Law And Economics Scholar's Survey And (Re)view* 10 UCLA Women's L.J. 39 (1999); Judith G. GREENBERG, *Insider Trading and Family Values*, 4 Wm. & Mary J. Women & L. 303, 307-08 (1998); Theresa A. GABALDON, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 Vand. L. Rev. 1387 (1992).

voice” of women.) In the case of business law, however, the exclusion feminist analysis has often engaged in has been one of an intellectual nature rather than a gendered nature. Feminist scholars, including some of those who have addressed business law, have felt a great antipathy towards the theories of law and economics (7), the other philosophical framework that also has transformed extensive aspects of law in the United States over the course of the past four decades (8). Furthermore feminist analysts’ rejection of law and economic analysis is rather significant when it comes to addressing business law issues since business law is the predominant subject matter in which law and economics has made its greatest and most far reaching contributions.

The antipathy of feminist scholars towards law and economic analysis arises for many reasons. Some of it stems from the “objective” abstraction that law and economics takes in its analysis which feminists do not find objective at all but a means to support the perspective of those in power while enabling them to maintain exclusion of those who are powerless. Some of the antipathy stems from the nature of the legal and policy conclusions that many law and economic scholars have reached, particularly in the early days of the field’s development, and whose impact continues to dominate law and economics jurisprudence today.

The predominant nature of law and economic analytic conclusions is one that scholars in the United States label as politically conservativ (9). Historically, one of the most salient distinctions between the liberals and conservatives in the United States has been the degree to which they believe in government regulation and intervention. The conservatives are identified as being against government intervention and the liberals are identified as favoring it. However the distinction has blurred in recent years as the conservatives gained increased political control and became willing to invoke government intervention to support values of theirs they found at variance with the once dominating 20th century liberal philosophy. Mainstream law and economic analyses typically tend to support big business and the results of the free market economy, and are opposed, as much as possible, to governmental regulation. On the other hand, feminist theory is viewed as politically progressive, liberal or left liberal, and for some feminists, even radical (10). Furthermore government intervention, whether through the judiciary, the legislature or the executive branch, has been the cornerstone of feminist advocacy in terms of remediating social policy. Hence advocates in each of the two disciplines regard each other with great suspicion, desiring the policy orientation the other carries.

(7) Theresa A. GABALDON, Book Review: *Book of Virtue: Lawyers and Fundamental Moral Responsibility* by Daniel R. Coquillette, Cincinnati: Anderson Publishing Co., 1995, 9 Geo. J. Legal Ethics 1221, n. 3 and accompanying text (1996).

(8) William M. LANDES & Richard A. POSNER, *Heavily Cited Articles in Law*, Symposium on Trends in Legal Citations and Scholarship 71 Chi.-Kent L. Rev. 825, 829-830 (1996).

(9) Cynthia A. WILLIAMS, *Corporate Compliance With The Law in The Era of Efficiency*, 76 N.C. L. Rev. 1265, 1275 (1998).

In the United States, the political right is considered “conservative” and the political left is labeled “liberal,” “left-liberal” or at the extreme left, “radical”. In the center are the liberal and conservative “moderates” with whom the bulk of the population’s sentiments lie.

(10) See CAIN, *supra* note.

But just as feminist analysis has come recently to be understood as a technique onto its own, apart from the (leftward-looking) concerns of feminists regarding women, so has law and economic analysis for some time now come to be understood as a tool of analysis independent of the political orientation of its early and most widely known advocates. In fact a number of writers have demonstrated how law and economic reasoning can just as easily assist efficacious reasoning of those with more liberal, progressive goals as well as those with a more conservative bent, though their voices have not been as widely heard in the legal profession (11).

It has now become clear that feminist theory is enlightening with regard to certain business law issues that have been seemingly unresolvable from either traditional or even the more modern law and economic approach. Similarly, it would seem reasonable for those applying feminist analysis to business law issues to incorporate insights law and economics analysis can provide when feminist analysis reaches a thwarting point. There is no reason why law and economic reasoning, as a tool, could not be employed within the value structure that the feminist scholars wish to operate. It would be a pity to lose the power of law and economic reasoning tools merely because those who have employed them in the main have had political goals at variance with those of most feminists. Certainly it has been demonstrated that the exclusion of the feminist approach to business law has deprived both business law and law and economic scholars solutions to problems in the business law environment that otherwise seem to persist.

In fact, in a certain sense, the rejection by both law and economic theorists and feminist theorists of the other's techniques has contributed to some of the impasses each have encountered when addressing particular business law problems. Each analytic framework has its capacities to undo different knots in attempts to unravel a difficult problem. The power of each analysis alone is evident in the success that each has had in influencing the shape of law, at least in the United States, in the last half of the 20th century. There is no question that they are the two most significant contributions to legal thinking in this period, albeit in different areas of law. They have only lately begun to cross over into areas that might be considered more likely the other's terrain. But when they have done so, they have done so in a manner that rejects what the other might offer and has indeed already offered (12).

- (11) See for example, Robin Paul MALLOY, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (2000); Nicholas MERCURO & Steven G. MEDEMA, *Law and Economics: From Posner to Postmodernism* (1997); Martha C. NUSSBAUM, *Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics*, 64 U. Chi. L. Rev. 1197 (1997); Jules L. COLEMAN, *Intellectual Property And Corrective Justice*, 78 Va. L. Rev. 283 Virginia Law Review (1992); Barbara WHITE, *Coase and the Courts: Economics for the Common Man*, 72 Iowa L. Rev. 577 (1987).
- (12) Jeanne L. SCHROEDER, *The Four Discourses Of Law: a Lacanian Analysis of Legal Practice And Scholarship* 79 Tex. L. Rev. 15 (2000).

It would be hard not to conclude that the synergistic effect of combining the two approaches could create great analytic power. A balance is called for, a collaboration of the two to create a greater whole than either of the individual parts (13).

How would this insight help us in understanding aspects of Yvette Merchiers' career? The criticisms that feminists have had regarding law and economic analysis has stemmed from the kind of analytic approach that law and economics uses. Though the motivation for the criticism may have been political disagreement, feminists' expressed criticism has been that law and economics thinking has those characteristics that feminists identify as "masculine thinking," the kind of thinking that in the context of women's issues, undermines efforts to redress women's interests and well-being and in general, is a detrimental approach to society's current complications.

Whether one agrees or not with a concept of "feminine" and "masculine" thinking, nevertheless, not only in the world of feminist analysis but in society at large as well, there has been an attachment of gender identification to fields of discipline and to styles of thinking and analysis and approaches to problem solving. Whether "masculine" and "feminine" are the most useful labels to put on these differences is not a concern of discussion here. Accepting these labels for the moment, it becomes clear that applying an exclusively feminist analysis to certain situations, while it can be unambiguously enlightening, at the same time it can also be limiting.

And just as applying a strictly "feminist" or "masculine" approach to a business law problem could prevent as full a resolution as possible, applying a strictly "feminist" or "masculine" approach to understanding the impact of a woman business lawyer's career would be just as limiting as well. It would not be surprising to observe that Yvette Merchiers, who pursued such a "masculine" career even though a woman, brought with her both elements — masculine and feminine — to her professional pursuits.

So by analogy, when we wish to understand the ramifications of a woman business lawyer's accomplishments, particularly one which has had as much impact as Yvette Merchiers', we want to be cognizant of both the "feminine" and "masculine" dimensions of it. A listing of Professor Merchiers' professional milestones without taking into consideration the underlying dynamics of Professor Merchiers' professional arc would be, as already noted, rather limiting in enlightening us of the nature of her impact. Though not an uncommon form of evaluation, a résumé listing would be called by feminist theory a masculine approach to assessing the career. The listing is an abstraction from the context in which the accomplishments arose, both the context of Yvette Merchiers herself and the context of the environment in which the accomplishments impacted. Though by "masculine" standards, a listing of accomplishments would be considered rather "objective,"

(13) *Id.* Kimberly D. KRAWIEC, *Fairness, Efficiency, And Insider Trading: Deconstructing The Coin of The Realm in The Information Age*, 95 Nw. U. L. Rev. 443 (2001). See generally Edward L. RUBIN, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 Harv. L. Rev. 1393, 1403 (1996); Barbara Ann WHITE, *Viewing Business Law Conundrums Through a Feminist Lens*, (Forthcoming).

one of feminist theory's contributions to law is that examining concepts abstracted from their context robs them not only of their full meaning but often gives them false meaning (14).

On the other hand, we do not wish to look at Yvette Merchiers' career solely from the aspects that appeal to the sensibilities of the feminist approach. Characteristics such as the identification of the "other," the inclusion of the excluded voice, the ethic of care, the approach of collaborative as opposed to hierarchical decision-making, all of which are emphases of feminist analysis, certainly are present in much of what Yvette Merchiers has done and how she has conducted herself professionally. But so are many characteristics that are normally identified as "male," at least by feminist theorists, present in Professor Merchiers' career as well and they have also served to enrich the impact of her accomplishments.

Thus what follows below is a view of Professor Merchiers' career through a feminist lens which stays cognizant of the more "masculine" aspects of her professional approach. This is done of course being mindful of disagreements as to proper labeling of any particular deed and also whether these labels are appropriate altogether. Nevertheless by taking this approach, it will be possible to put both "feminine" and "masculine" aspects of Professor Merchiers' professional life into a more informative context, certainly the goal of every feminist analysis. Therefore hopefully a more inclusive view of her endeavors will reveal dimensions that otherwise may go unacknowledged.

Consistent with that motif, the method of examination adopted here is a technique frequently employed by feminist scholars and that is the technique of narrative. Narrative has been used by feminists to access information that is usually not available by more traditional scholarly means. The narrative technique approaches a subject by interviewing people and listening to them tell in their own words their perceptions of events, how they felt about them and what conclusions they drew from their experience. Narrative was employed as a research technique because feminists felt that the woman's point of view could not be represented in traditional analytic frameworks. Since feminists were typically concerned with woman's issues, the inclusion of the woman's "voice" obviously would be central to their endeavors (15).

Since the purpose of this essay is to present aspects of Professor Merchiers' career in a context that might otherwise go unnoticed, a narrative approach — hearing how others viewed Professor Merchiers' career — would give an interesting slant on the course of her professional life. For the purposes of this essay, interviews with family, friends and colleagues of hers, people who have known her throughout the years were conducted. These individuals know her work well, her actions at critical points in her career and have observed the response her professional environment has had towards her endeavors. And of course interviews with Yvette Merchiers herself were conducted — though she did not know of the dual motive behind the conversations — that is, not only were discussions initiated because

(14) Margaret F. BRINIG, *Comment on Jana Singer's Alimony And Efficiency*, 1994 Symposium: Divorce and Feminist Legal Theory, 82 Geo. L.J. 2461 (1994).

(15) Kathryn ABRAMS, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991)

of professional interest by the author of this essay in Professor Merchiers' work itself but also at times those conversations with her served as part of the narrative exploration.

A brief disclosure regarding this essay's author is warranted here. In one sense, I am an outsider to Yvette Merchiers' world, being of the United States, having come to know her, her work and Belgian society only in the last couple of years. In another sense I am not. Though my scholarly career began later than hers, it was still in an era when a woman's professional efforts were often impeded by gendered prejudice and when accomplishments were obtained, they were frequently considered among the group of women "firsts." Also, more particularly similar to Yvette Merchiers, my fields of choice were more closely identified with the "male" intellect: economics at first and later the law of business and the theories of law and economics.

Though a beneficiary of the women's movement in the United States, my professional interests — like Yvette Merchiers' — have not included concerns of women. Only in recent years when feminist theorists turned their attention to business law matters was my own attention turned to feminist theory. There I found a solid body of philosophical analysis, a framework for evaluating complexities different from any I was familiar within my own fields. But most importantly, I saw that feminist analysis was eminently capable of addressing questions totally unrelated to women's concerns.

Finally, my knowledge of French is extremely limited and my knowledge of Dutch is non-existent, the two languages in which Professor Merchiers has written. Though conceivably a limitation to my task here, in fact, it is an advantage as is the brevity of time in which I have come to know Professor Merchiers. As a result, the distillation of the narratives about the course of her professional life depends almost exclusively on the recitation of others and are little influenced by my own personal experience. I was fortunate however to have some direct feel for Professor Merchiers' writings as some of her work has been published translated into English and others in her circle were kind enough to translate other works of hers for me.

What is presented here is intended to be neither an exhaustive treatment of feminist theory nor an exhaustive treatment of Professor Merchiers' accomplishments. It serves however to highlight aspects of Professor Merchiers' professional life that would be interesting to note in a feminist light. As a result it shows dimensions of Professor Merchiers' impact that might otherwise go unremarked.

Chapter 2.

Business Lawyer, Woman Warrior

Great courage is a distinction that marks many women "firsts." The professional loneliness they have had to face, the obstacles they have had to overcome, the level of excellence at which they absolutely had to perform would have made many successful men feel faint-hearted if faced with the same environment.

Courage is probably the most salient characteristic of Yvette Merchiers, one that emerges repeatedly when one examines the narratives and the facts of her life. This should come as no surprise. Professor Merchiers undertook a particularly solitary path which, given the (male) professional resistance towards the admittance of a woman to their ranks, was a path that demanded considerable courage on her part. She not only went into law, a field not welcoming of women, but into business law, a field considered peculiarly “male” and not suitable for female temperament or intellect (16); it was a field into which other women of her time did not go. Thus she did not have the solace of empathic fellow women warriors for comfort during difficult times. Internal courage would be an essential ingredient in order to maintain motion forward.

Furthermore, other courageous women of her time who did enter fields that grappled with women’s concerns could draw on the passion ignited in them by such endeavors to fuel their courage to overcome (discriminatory) obstacles. Yvette Merchiers had none of that advantage. Her field did not have motivating women’s issues to address. It was the discipline’s pure intellectual interest that drove her. Her courage had to come solely from within herself rather than draw on impassioned sense of human rights for a class of people among which she could herself number. Her singularity of interest had to inure her against the barbs cast upon her as she emerged ever broader into her profession.

Yvette Merchiers’ inner motivation and intellectual drive manifested itself throughout her career. She ventured in directions that were not only rare for or never undertaken before by a woman, but in many instances, she also ventured in directions that no one — male or female — had tackled previously. Thus she not only possessed the courage to break new ground in areas by virtue of being a woman in her field but she also chose to break new ground for which there was no mold at all. And she engaged in these endeavors while facing criticisms often motivated by grounds no more substantive than it was a woman doing it.

There are three distinct dimensions to Yvette Merchiers’ career that deserve comment: her role as practitioner, her role as scholar and her role as academic institutional leader. Each of these dimensions predominated at different times and different points in her career. And with each of them, Yvette Merchiers manifested both her “masculine” and “feminine” sensibilities. To a certain extent one might observe that often the power of her effect transcended distinctions between “male” and “female,” in other words what she manifested was the sheer force of her personality itself.

(16) This attitude has long history. “That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded [in England] as an almost axiomatic truth.” *Bradwell V. The State*, 83 U.S. 130, 132 (1872) (U.S. Supreme Court denying Mrs. Bradwell admission to practice law in the Iowa State Bar); “...[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman... The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” *Bradwell V. The State*, 83 U.S. 130, 141 (1872) (Justice Bradley concurring in the Supreme Court’s decision).

Her role as practitioner appeared in many stages, sometimes in combination with her other roles. She started as a student of law at the University of Ghent, the institution to which she would later return for her most formidable years. After doing brilliantly in her studies (graduating in 1958) she was admitted to the Ghent bar and practiced for seven years. Though in this instance Yvette Merchiers was not a first woman's "first," she was following intimately upon the steps of one, her own mother. Paulette Hallet, Yvette Merchiers's mother, was not only one of the first women ever to graduate from Ghent law school but was also the second woman to be admitted to the Ghent bar.

As Professor Merchiers' reputation grew, she served as a member of the Board of Directors for the King Boudewijn Foundation (17), was appointed to the High Counsel of Accounting and Auditing (18) (later called the High Counsel of Economics of Businesses (19)) that oversaw the financial matters of Belgian corporations (serving since 1981), served as counselor to the High Court (20) (1993 to '98) and from 1994 by official decree, she has served as alternate permanent expert for the Commission on Unfair Contract Terms (21).

Her role as a scholar is particularly notable. Her scholarly career has been long-ranging and far-reaching. Beginning with her graduate studies in comparative law at the Sorbonne, where her Masters thesis won the *Prix du Centre Français de Droit Comparé* (Prize of the French Center for Comparative Law) in 1960, Yvette Merchiers then became a researcher at the Inter-University Center for Comparative Law from 1960 to 1965. In 1962 she started her career at the University of Ghent first as a part-time assistant then a full-time assistant in 1965 and then in 1968 at the time of the completion of her doctoral dissertation she became Senior Assistant. She was a researcher there until she became a lecturer in 1971. In 1981 she was promoted to permanent (tenured) member of the Law Faculty as a Law Professor and as well the Director of the Department of Contracts and Business Law within the Law School.

It is during this first part of her scholarly career that Yvette Merchiers encountered direct resistance to her professional presence because she was a woman. She was the first woman to become a Law Professor and the second woman to become a Professor at the University of Ghent as a whole. Her appointments as part-time then full-time assistant was the typical path at Ghent for earning a Ph.D. Her appointment as a Senior Assistant and then researcher and lecturer was the typical path for becoming a permanent Law Professor. Her rise from completion of her dissertation to becoming a permanent Law Professor was rather rapid. It was even more noteworthy because in this she was clearly one of the first women "firsts."

There were objections and grumbles to Yvette Merchiers' rise to this male preserve and efforts were made to thwart her movement forward. Nevertheless, she was psychological impact of opposition that is driven not by what is accomplished

(17) Koning Boudewijntstichting.

(18) Hoge Raad voor het Bedrijfsrevisoraat.

(19) Hoge Raad voor de Economische Beroepen.

(20) Raad van State.

(21) Commissie voor Onrechtmatige Bedingen.

but by who the person is. Choosing a professional course in life is an endeavor already fraught with anxieties and insecurities, doubts about one's capacity to succeed. One's resolve must be even stronger when those internal doubts are compounded by unwavering external rejection because of who one is. It is clear from all who have known her that Yvette Merchiers was bold, bold enough to withstand whatever barbs that were cast her way, bold enough to keep progressing forward despite the naysayers, persistent enough to continue with her vision of the law and accomplishing her goals in her chosen career.

One might think that once succeeding in becoming a Law Professor, that non-merit-based evaluations of Professor Merchiers' work would end. Certainly her academic and scholarly accomplishments and insights brought professional acknowledgments and honors throughout her career. She was appointed to the editorial boards of a number of journals in her field; she often served as the reporter for a number of noteworthy conferences both in Belgium and abroad. She served on the juries for selecting two prestigious awards: the Critical Review of Belgium Jurisprudence Prize (22) and the Jean Bastin Prize.

Probably her most noteworthy acknowledgment was being awarded the prestigious Francqui Prize of the Dutch Free University of Brussels in 1987. As holder of the Franqui Chair for the year, Professor Merchiers was to give a series of public lectures on a topic of her choosing. She chose to give her lectures on a topic never addressed before in Belgian law seriously: the rights and protections of minority shareholders. Apparently, her choice of topic was received with less than laudatory response. It seems it was deemed a topic so insignificant that it served no interest nor possessed any substance. In fact, remarks were made that Professor Merchiers probably picked a topic concerning the unprotected, i.e., minority shareholders, because she was a woman, fueling the latent gender discriminatory sentiments in the profession at large. Thus despite all of Professor Merchiers' scholarly accomplishments, despite the fact that much of what she wrote were considered the seminal treatments of the subjects, she was not accorded the deference in her topic choice that a man in her position would likely have received.

Admittedly, the subject of minority shareholder rights at the time may have seemed like a subject of no immediate importance. But if a man of Professor Merchiers' stature would have selected such a subject, though colleagues might wonder at such an apparently unremarkable choice, it is more likely that their response would be, "well perhaps I do not see the significance of looking at this subject, but Professor ... has written many important and interesting works before and likely Professor ... sees something interesting that I do not." But for many in Professor Merchiers' field, such sagacity was not to be the case.

Fate, however, demonstrates a not so humorous sense of irony when it wishes to teach lessons. Several months after Professor Merchiers' widely received Franqui Lecture Series on the protection of minority shareholder rights were delivered, Belgium experienced its first major hostile takeover by a foreign national (23). The

(22) Prix de la Revue critique de Jurisprudence Belge.

(23) The takeover effort came from Italian business man Carlo De Benedetti, former chairman of Ing. C. Olivetti & C., S.p.A.

target corporation was of one of Belgium's most important companies (24). This set off a chain of events that meant that Belgians were in fact faced for the first time with the threat of becoming defenseless minority shareholders in their own companies in their own country (25). Suddenly the rights and protections of minority shareholders took on paramount significance in Belgium. Scurrying to look to the law for protection, they found little. Demands were made for the Belgian legislature to make new laws. But where were the legislators to turn to for guidance? Nothing had been written on this issue — except for Professor Merchiers' Franqui lectures. Suddenly what was considered insignificant was now considered incomparably significant. Professor Merchiers was the leading authority on the subject. With great urgency, the legislature wrote new laws to protect Belgians from their own vulnerabilities and minority shareholder rights became one of most important topics in business law and the subject matter of a number of important doctoral dissertations subsequently. Once again Professor Merchiers' insight showed itself in foresight. Today there has been a dramatic change and evolution in Belgian law with regard to minority shareholder rights and protections.

The third dimension of Yvette Merchiers' career is her role as institutional leader. As noted earlier, upon her appointment as Professor of Law at the University of Ghent, she was also appointed Director of the Department of Contracts and Business Law. In the latter years of her academic career, as a result of a law faculty restructuring, she became the Director of the Department of Contracts and Insurance Law. In both positions she provided exemplary leadership.

Probably the most significant contribution Yvette Merchiers made as an academic, however, was the result of being elected by her colleagues to be the first female Dean of the Law School. It occurred just after the Law faculty members and Political Sciences faculty members, who had historically resided together under the auspices of the Law Faculty, made the rather traumatic decision to separate with Political Sciences forming its own Faculty. Standing as a faculty focusing on law alone, the Law Faculty needed a new direction and form. Unquestionably, whomever the faculty elected as Dean would be a critical decision since the new Dean would be faced with significant and challenging responsibilities to reshape this institution. Apparently whatever sentiments that were disturbed by the prospects of having a woman as a colleague a decade earlier had now subsided sufficiently so as not to deter the faculty from choosing a woman as their leader. Clearly it was in their best interests for the faculty to vote for the candidate they felt would serve them most effectively during these difficult times. Now issues of gender no longer clouded the issue, Professor Merchiers' competency as a strong leader was self-evident, and Yvette Merchiers became the Law Faculty's first female Dean.

(24) Société Générale de Belgique, Belgium's crown jewel in the corporate world.

(25) Intertwined with several court proceedings, De Benedetti's tender offer through the company CERUS was made and ultimately failed. But Societe Générale de Belgique still ended up in foreign hand because finally it was taken over by the French company Suez Lyonnaise des Eaux.

As Dean, Professor Merchiers undertook an extremely difficult task. The law faculty was a law school unto its own for the first time. Immediately, many issues arose in flurry that had to be deftly handled simultaneously. These were issues that were not only internal to the law school itself but external with regard to how the law school was going to establish itself within the University structure.

Apparently Dean Merchiers handled all these concerns with great insight and foresight, aplomb, and alacrity. Within the law school she guided the revamping of the curriculum to reflect one of a true law school, ensuring that the courses taught reflected a more rigorous legal education rather than merely a general one with some emphasis on law. She helped guide the reclassification of various scholarly and academic efforts to evaluate their relative professional value (e.g., publishing books relative to articles, comments on judicial judgments relative to teaching university courses, etc.) As it was a period of contracting resources, she also provided the framework within which the faculty struggled to determine how to allocate the limited resources among themselves. Not surprisingly, in such a competitive environment, each faculty member wanted more for their own area than was available when everyone's demands were aggregated. Apparently Dean Merchiers showed again her fortitude and strong will by making important ultimate decisions and choices, some of which alienated her from some faculty members permanently. As one knows, this is often a consequence of good strong leadership, particularly in difficult times of constraint. It was better for the law school over all to have clear decisions made with forethought that allocated the resources in some efficient manner, than for the dean to be paralyzed trying to please everyone, offending no one and deciding nothing. The law school as whole loses when the leadership demonstrates that kind of weakness. The Ghent Law School was fortunate to have a dean so capable of being so decisive.

The comments on her leadership, even by those who disagreed with her decisions, were that though she was strong-willed (which almost certainly was an asset under these circumstances), she also was straight-forward and honest. She had no hidden agendas and everybody, regardless of their views, could trust and rely on that. That is truly an admirable quality of a Dean — male or female — and a difficult one to achieve and maintain.

These same qualities assisted Dean Merchiers when dealing on behalf of the law school within the University structure. Apparently the study of law was not taken that seriously at the University level up to this point in time. Legal analysis and legal scholarship was not considered that "scientific" (a better translation in English would probably be that it was not considered very "rigorous.") (27). Dean Merchiers was able to argue vigorously and persuasively that indeed the study of law was a serious and scientific enterprise, deserving of such treatment and support

(26) Y. MERCHIER, "De bescherming van minderheden in rechtspersonen", in X, *Rechtspersonenrecht*, Postuniversitaire cyclus Willy Delva 1998-1999, Gent, Mys en Breesch, 1999, 259-307.

(27) This would seem puzzling to readers from the United States as there has been a long complaint that law in this country attracted a disproportionately large percentage of the brilliant students because of its attractiveness both as rigorous and socially impactful.

by the University as a whole. As a result of her efforts she was able to limit the extent that contracting resources impacted on the law school. Furthermore under her leadership the law school was able to establish itself as a peer among the other fields at the University and to be taken seriously.

When she stepped down from the Deanship she continued her advocacy of the law school through her appointment to the Board of Regents of the University. She continued in that position until the year 2000, one year before her retirement.

When one examines what Professor Merchiers has accomplished in the course of her career, the listing itself — for a man or a woman — is impressive. She influenced the shape of Belgian law, the shape of Belgian legal scholarship and the shape of the major Belgian legal institution of learning. It would be rather easy to stop here and say how remarkable! This remarkableness is true apart from the awareness we now have of the additional obstacles she faced because she was a woman. The characteristics that Yvette Merchiers demonstrated: courage, boldness, persistence, persuasiveness, determination, strong-will, honesty, straightforwardness are often characteristics that are spoken of with admiration when speaking of a male leader. Clearly Professor Merchiers possessed these “male” characteristics in meaningful proportions that permitted her to forge forward as a leader in the various dimensions of her career.

But there were other characteristics of Professor Merchiers, ones that were equally productive, albeit in a different way, characteristics that might more often be attributed as being “feminine” in nature. These are characteristics that do not necessarily manifest themselves in her “public” persona but emerge only through the narratives, the interviews with individuals that knew and worked with her. Though they were not “public” characteristics, they were nevertheless important qualities to the success at all levels of her leadership. Once we are aware of them, many of these characteristics also become evident, albeit in a more subtle level, in the more “public” elements of her accomplishments.

Just as Professor Merchiers was effective in advocating on behalf of the law school, it is frequently reported by many people that she was extremely effective in advocating for those within her authority, people who were her assistants over the years, faculty who were within the departments she led, students who were studying under her. She has always been extremely loyal to those within her responsibilities, even when she was new to the position of leadership and did not know the individuals as yet very well. She is repeatedly described as extremely protective and nurturing. She promotes and encourages, inspires and motivates those under her to achieve what they are able to achieve. This ‘motherly’ quality of Yvette Merchiers, so evidently expressed in so many of the interviews, is a quality that feminists have asserted as one of the sensibilities that would result from including women in the corridors of power. Though in a pre-feminist era, “motherliness” would be considered soft and promoting weakness, a sensibility not appropriate or useful for the hard-hitting world of the economic and political arena of professional life, what feminists have demonstrated is that by excluding this “feminine” perspective has actually caused harm to society’s well-being as a whole.

Feminists have redefined many of the characteristics that in other contexts would be associated with "motherliness." Probably the most fundamental principal along these lines that feminist thought has advocated is the "ethic of care." Feminists argue that social policy and social conduct should be guided by the principle of the ethic of care, in which concern is expressed for the well-being of others as well as oneself. The "ethic of care" is in contrast to a rights-based "neutral" sense of justice that is traditionally viewed as "objective." In the "neutral" view, people are assigned certain rights by society. In the context of those right assignments, conflicts should be judged neutrally, based on those rights, and by doing so, those passing judgment are being objective. Feminists called that kind of analysis as "masculine thinking" and male oriented. Rights in that framework were allocated to provide justice among those who belonged to the class in power to ensure that at an individual level, the needs of each person of the dominating class were met in the context of the group as a whole. No consideration was given to the needs of the "other," those who did not fit the characteristics of the people in the class of power. People who are part of the "other" often have different needs, needs that equally ought to be met. But rights-based neutral justice has no scope or flexibility to consider the needs of "others." If one does not fit the profile of the class of people in power (or does not belong to it), one's needs will not be even recognized as a valid concern (28).

Of course feminists, when first writing in this vein, were concerned with women as "the other." It was women's needs that were not being addressed in the existing system of rights that assured equality among men. The question that feminists were concerned with was how was one to include the rights of "the other." For their answer, they turned to the qualities traditionally viewed as characterizing women and found there a compassion and a sense of concern for the well-being of others and the capacity to recognize and attend to each individual based on his or her individual needs. Characterizing this as the ethic of care, feminists drew on this as the principle that should guide the social policy at large and not just a policy to be applied by mothers, for example, within individual families and its members.

Though one can easily argue whether the ethic of care is peculiarly a woman trait, what is clear that regardless of its source, premising social policy on the ethic of care in contrast with a rights-based system concerned with the needs of the dominant group would provide the scope for all people's needs to be met and not just those who belong to the class of power. Yvette Merchiers obviously possessed this sensibility. Her concern for those under her, her efforts to encourage and nurture them, to look out on their behalf can only be motivated by a sense of the ethic of care. And she applied this principle to all who came within her orbit of responsibility regardless of who they were, male or female, student or faculty, a friend of long-time standing or someone new to her circle. And just as feminists argue that applying such principles to society at large will enhance social welfare overall, Professor Merchiers applying this principle in her world

(28) For solid analyses of feminist legal theory, among the classics are: Katherine T. BARTLETT, *Feminist Legal Methods*, 103 Harv. L. Rev. 829 (1990); Deborah L. RHODE, *Feminist Critical Theories*, 42 Stan. L. Rev. 617 (1990); Robin WEST, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988).

made all within her circle more productive and have more satisfying professional lives.

One aspect of the ethic of care, the concern for "the other" appears to have manifested itself as well in Yvette Merchiers' writings. Indeed it may have been true that Professor Merchiers chose the subject of minority shareholders rights for the Franqui lecture series because of the sensibilities of her gender. Though her critics at the time may have been right that she chose the subject because she was a woman, they certainly were not right for the right reasons. It was not out of feminine "weakness" that Professor Merchiers wrote with regard to a potential underdog. The point of the ethic of care is to recognize a need, areas of vulnerability and then put in place the means to meet that need and protect that vulnerability. It became evident shortly after her lectures by coincidental circumstance that indeed under Belgian law, minority shareholders had limited protections and that this was in fact a serious problem. Hopefully the ethic of care would guide one to recognize these vulnerabilities before problems arise. Certainly Professor Merchiers' lectures pointed out the issues before there was an immediate cause for concern. As a result law makers had some framework to guide them when a serious problem did arise. Without this anticipatory foresight, surely the situation at the time would have been far more confusing to address.

Another aspect of the feminist approach is the integration of what are normally considered separate spheres. The feminists were focusing on the fact that such sharp distinctions were made between work and home that the consideration by the work place for the needs of the home had all but vanished. Feminists pointed out how this created undue harm for society as a whole. It created false estrangements between fathers and their children, it put stresses on family life that was not good for any of its members, it forced unnecessary family sacrifices in order to enable the father to succeed in the workplace. It in effect put work as the end goal in itself as opposed to being a means to provide for a more fulfilling life.

The danger of creating separate spheres are apparent and not just for the separation between work and home life. In every aspect of life, sharp divisions that create discrete areas of knowledge or life do not allow for important information to flow from one division to another. Decisions made in isolation without information about other dimensions are likely not to be decisions that will enhance overall well-being maximumly. Criteria used for isolated decision-making necessarily will become distorted and skewed. Benefits that seem optimum in a narrow context may be in fact quite sub-optimal in the broader framework. Hence feminist theory advocates the integration of disparate spheres, regardless of the context in which the distinctions arise.

The course of Professor Merchiers' professional career reflects this philosophy. Often there are sharp divisions between the world of the practitioner, the world of the scholar and the world of the university administrator. The world of the scholar is often referred to as an "ivory tower" reflecting the fact that so often scholars are very much out of touch with what is occurring in the "real world." Yvette Merchiers' professional life reflects none of that. Her public service regarding legal matters is manifestly evident through all her appointments to the commissions and high courts that she served. Her leadership within the university

brought her visions to be actively applied to the institution of learning. And her scholarship as well served many important practical purposes.

There is another dimension of Professor Merchiers' influence that reflects an integration between worlds and in fact her retirement reflects the end of an era of such integration. Professor Merchiers is one of the last on the Ghent Law Faculty to write and publish in both Dutch and French, the two major languages (and linguistic populations) in Belgium. Her work facilitated a cross-fertilization between two rather distinct legal perspectives: one which is influenced by the law in the Netherlands and the other which is influenced by the law in France. As Belgium grows more and more split in its cultural divisions between the French and Dutch speaking populations (29), so has its universities. Scholarship is one means to keep cross-cultural fertilization alive but it requires people who read and write in both. With the departure of Professor Merchiers from the Ghent law faculty, that cross-fertilization will be lost.

There are other elements of Yvette Merchiers' professional life that do not fall neatly into one or another gender classification. These are elements that are just Yvette Merchiers herself. She is repeatedly described as energetic, tireless, and with exacting standards. Not only did she motivate people to perform but she expected them to perform extremely well. She held that standard for herself as well. As one individual said, "there is no burnout" for Professor Merchiers. Indeed when she took over as Director of the Department of Contracts and Insurance in the last years of her academic career, even though she had never written in the field of Insurance Law, she took up the field and made it her own, publishing on that subject as well as all the others she had written in the course of her interesting scholarly career. These aspects fill out the dimensions of Yvette Merchiers, showing again her force of personality.

It seems to be fitting to close this essay in her honor with some comments and an anecdote told to me about her.

"She is the best boss anyone could ever have."

"She is extremely loyal and protective."

"She is warm, compassionate and caring."

"She is at times brusque and somewhat harsh, but always straightforward and trustworthy."

"She had no hidden agendas."

In the earlier days of her teaching career she was apparently given to wearing rather somber clothes, presumably to minimize as much as possible the consciousness of her being a woman in what was clearly a man's world. Later in her career, she became tired of this "hiding" appearance and decided to change her attire to a more female style of dress. She decided boldly one day to wear a red dress to her class. The students were momentarily shocked by this apparition. But as they understood what they were witnessing, they began to pound on their

(29) Indeed, the constitution of Belgium was recently amended to reflect these increasing divisions. Greater regional autonomy and political separation between the Dutch- and French-speaking portions of Belgium exists as a result.

desks with great enthusiasm to show their appreciation and encouragement for the great Professor Merchiers to continue in this new, positive direction.

“She is the last of dying breed.”

and finally (30)

“Yvette Merchiers: une grande dame!”

(30) The following is from an anonymous essay written about Professor Merchiers in the *Journal des Tribunaux*, 1995.